**APPENDIX A**

No. 129 Original

IN THE

SUPREME COURT OF THE UNITED STATES

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COMMONWEALTH OF VIRGINIA,
*Plaintiff,*

v.

STATE OF MARYLAND,
*Defendant.*

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Motion of the Audubon Naturalist Society
to Dismiss for a
Lack of Subject Matter Jurisdiction

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## INTEREST OF *AMICUS CURIAE*

The Audubon Naturalist Society ("ANS") respectfully incorporates by reference its statement of interests in its Motion for Leave to File A Motion to Dismiss for Lack of Subject Matter Jurisdiction. The Supreme Court already has ruled that ANS has the authority to raise these jurisdictional issues before the Court as *amicus curiae*.[1]

## STATEMENT OF THE CASE

Due to the rapid and largely unchecked development of Northern Virginia, considerable urban runoff empties into Sugarland and Broad Runs and then flows into the Potomac River. The adverse impact of this sedimentation on the Potomac River and its users is considerable; however, the Commonwealth's Complaint focuses only upon the impact to the Authority. The Authority is concerned that its shoreline intake withdraws these waters and the associated sediment and it must filter out and dispose of the wastes at great expense. Assuming that Virginia's sedimentation problem will not improve, the Authority seeks to move its intake away from the Virginia shoreline. The Authority does not, however, seek an increase in its appropriation of water.

For more than twenty years, the Commonwealth has ignored its legal obligation to control the sedimentation. Since 1977, it has been "the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner. . . ." 33 U.S.C. § 1251(a)(7) (1994). This Court has explained that this policy reflects Congress' belief that "'it is essential that discharge of pollutants be controlled at the source.'" *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (quoting S. Rep. No. 92-414, at 77 (1972)).

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[1] *Virginia v. Maryland*, 120 S.Ct. 2192 (2000) ("Motion of Audubon Naturalist Society for leave to file a brief as *amicus curiae* granted.").

The Clean Water Act places the burden of preventing nonpoint source pollution, including urban runoff, on the states in the first instance. The Commonwealth is required to identify areas where nonpoint source pollution, including "construction activity related sources of pollution," are present and "set forth procedures and methods (including land use requirements) to control to the extent feasible such sources." 33 U.S.C. § 288(b)(2)(H) (2000). Congress made grants available to the states to assist them in this endeavor, *id.* at § 1288(f), and provided technical assistance from federal agencies. *Id.* at § 288(g)-(i). In addition, "Section 1329, added to the Act in 1987, requires States to adopt nonpoint source management programs and similarly provides for grants to encourage a reduction in nonpoint source pollution." *Or. Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1097 (9th Cir. 1998).

States are required to establish water quality standards that are designed, *inter alia*, to protect the water body's "use and value for public water supplies," 33 U.S.C. § 313(c)(2)(A), and, where those standards are not met, states are required to set a total maximum daily load ("TMDL") for pollutants, including sediment, that would allow those standards to be achieved. 33 U.S.C. § 1313(d)(2). If EPA rejects the state's designation of an area where a TMDL is needed or the proposed TMDL for that area, EPA is required to make those determinations. 33 U.S.C. § 1313(d)(2).

Once an area is designated and a TMDL is set, the Commonwealth must then devise and implement a plan that will bring the water body into compliance with the TMDL. 33 U.S.C. § 1313(e). EPA's anti-degradation policy prevents back-sliding after the standards are met by requiring, *inter alia*, that the Commonwealth use "all cost-effective and reasonable best management practices for nonpoint source control." 40 C.F.R. § 31.12(a)(2); *see also* 33 U.S.C. § 1313(d)(4)(B).

TMDL's are highly effective in restoring water quality. "Congress and the EPA have already determined that establishing TMDLs is an effective tool for achieving quality standards in waters impaired by non-point source pollution." *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 985 (9th Cir. 1994); *see Am. Iron and Steel Inst. v. EPA*, 115 F.3d 979, 1002 (D.C. Cir. 1997) (endorsing TMDL for the Great Lakes).

Although the Commonwealth concedes that non-point source pollution into Sugarland and Broad Runs compromises the Potomac's "use and value for public water supplies," 33 U.S.C. § 313(c)(2)(A), it has not implemented the required controls. The Commonwealth's Complaint makes this concession explicit: "[t]he Authority's present intake at the Virginia shoreline is adversely affected by runoff from upstream tributaries following local rainstorms . . . . These conditions significantly interfere with the smooth operation of the water treatment plant . . . ." (Compl. at 10, ¶ 21.)

The Commonwealth's failure to comply with the Clean Water Act is a pervasive problem. Although "Virginia was to have submitted initial TMDLs to EPA by June 26, 1979, and thereafter from 'time to time,'" *Am. Canoe Ass'n v. EPA*, 54 F.Supp.2d 621, 623 (E.D. Va. 1999), the Commonwealth never has taken this obligation seriously. As one court recently discovered, "[i]n the nearly twenty years that have elapsed since the initial 1979 deadline, Virginia either has submitted no TMDLs or has submitted a single TMDL for one small tributary in the state, and EPA has never established any TMDL for any of Virginia's waters." *Id.* at 624.

After twenty years of noncompliance by the Commonwealth, environmental organizations sued EPA to set TMDLs for Virginia. *Id.* at 622. The District Court approved a consent decree that establishes a time-table for the Commonwealth to submit TMDLs and that compels EPA to

issue TMDLs if the Commonwealth misses those deadlines. *Id.* at 629. As a result of the consent decree and the Commonwealth's acknowledgment of sedimentation problems in Sugarland and Broad Run, the Commonwealth is obligated to implement a program to control the sedimentation.

Despite the existence of the consent decree, the Authority evidently questions the Commonwealth's intention of honoring its obligations under the Clean Water Act. In assessing its future water needs, the Authority's model assumes that the sedimentation levels affecting the current shoreline intake will remain constant over the next 40 years. (Draft Response to U.S. Army Corps of Engineers Regarding U.S. Fish and Wildlife Service Comments on Joint Application for Permit for Potomac Mid-River Intake at 2 (Dec. 1996) (App. F).) Consequently, the Authority proposes to spend $5.3 million on a new intake in the middle of the river to avoid the sediment contamination along the Virginia shoreline. *Id.* If the Commonwealth controlled sedimentation to even a modest degree, the Authority's report demonstrates that the intake would not be cost-justified.[2]

Because the Authority proposes building this mid-river intake on soil that is both owned by and within the territorial jurisdiction of the State of Maryland, Maryland law requires the Authority to seek a permit from the state. The permitting

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[2] The Authority's study estimates the present value of solids and handling costs for the next 40 years at $7.2 million and the cost of constructing the proposed intake at $5.3 million. (App. F. at 2.) The conclusion in the Authority's report that the project will save $1.9 million rests upon the assumption that the Authority's consumption of water from the shoreline intake will increase by a factor of three and one-third and that sediment levels will remain the same over the next 40 years. *Id.* Even a modest reduction in solids handling costs, spread out over 40 years, would eliminate the narrow margin of profitability for this project.

section of MDE denied the Authority's permit as unnecessary because the Authority already provides water that meets and exceeds all state and federal water quality standards. (Va. App. L.)

The Authority filed an administrative appeal claiming that it is entitled to the permit under Maryland law and pursuant to various interstate compacts between Virginia and Maryland. A Contested Case hearing was held before an Administrative Law Judge ("ALJ") with Maryland's Office of Administrative Hearings, whose decision in favor of the Authority has been appealed to a Final Decisionmaker for MDE. The Final Decisionmaker's opinion is expected in approximately one week. Either party may appeal that decision to an intermediate appellate court based upon the record developed before the ALJ. After exhausting State appeals, review of Compact issues may be had by the Supreme Court through *certiorari*.

## ARGUMENT

The central question presented by this case is whether riparian land owners along the Virginia side of the Potomac River who attempt to exercise property rights in Maryland are subject to Maryland's police power. Although Virginia views Maryland's preliminary decision not to authorize the Authority's proposed construction of a mid-river intake on the State of Maryland's property as "a direct challenge to Virginia's sovereignty," (Br. at 21) it is hard to conceive how this could be so. The Commonwealth has no jurisdiction in the State of Maryland, the undisputed site of the proposed intake.

Moreover, the rights that the Commonwealth asserts are not its own rights, but the rights of third party riparian land owners on the Virginia side of the Potomac. The Commonwealth has not established that it has suffered or could ever suffer any direct injury as a result of the claims it makes here.

This Court should refuse to entertain the Commonwealth's suit because none of the Commonwealth's legal claims are ripe, and the Commonwealth would lack standing to bring them if they were.[3] No Virginia riparian land owner is seeking to increase its appropriation of water from the Potomac, and only the Authority has proposed a construction project in the river. The Authority needs both a permit from MDE and a federal permit from the Corps to begin

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[3] When concerns that the Court lacks jurisdiction are raised by *amici*, the Court gives them the same consideration as if raised by the parties. *See e.g., ASARCO, Inc. v. Kadish*, 409 U.S. 605, 611 (1989) (considering *amici's* jurisdictional challenge because the Court "would be required, of course, to raise these matters on our own initiative"). In original action proceedings, where there is no record, the Court typically allows the Special Master to build whatever record is necessary to consider the jurisdictional issues in the first instance. *See Wyoming v. Oklahoma*, 502 U.S. 437, 463 (1992) (Scalia, J., dissenting) (noting that Oklahoma had challenged the standing of Wyoming in its opposition to the motion to file a bill of complaint and in a motion to dismiss before the case was assigned to a Special Master, and concluding for three members of the Court when considering the Special Master's report that Wyoming lacks standing); *id.* at 796 (White, J.) (noting that the majority "would not hesitate to depart from our prior rulings" if it agreed with the dissent that Wyoming lacked standing); *New Jersey v. New York*, 283 U.S. 336, 341 (1931) (relying upon Special Master's report in finding a claim not ripe). Consequently, it cannot be inferred from the Court's silence in allowing the Bill of Complaint to be filed that the Court has decided the jurisdictional issue. *Cf. Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 521, 527 (1957) (Frankfurter, J., dissenting) ("The Court does not, indeed it cannot and should not try to, give to the initial question of granting or denying a petition the kind of attention that is demanded by a decision on the merits."); *see also FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990) (*sua sponte* addressing jurisdictional issue and deciding against jurisdiction after the grant of *certiorari*, even though the jurisdictional issue was not raised by the parties); *Nixon v. Fitzgerald*, 457 U.S. 731, 741 (1982) (considering *sua sponte* a jurisdictional argument raised in an opposition to the petition for *certiorari* that was not argued again after *certiorari* was granted).

construction, and neither has made a final permitting decision. Consequently, no ripe controversy now exists and it is uncertain whether one ever will.

In the event that a legal claim does become ripe, the Commonwealth is not the proper party to assert it. The real party in interest would be the Virginia riparian land owner who has been denied a permit by Maryland. This Court repeatedly has held that a state cannot manipulate the original jurisdiction of this Court by suing on behalf of the real party in interest. If this Court were to permit the Commonwealth to bring a *parens patriae* action, it would distort the Article III distinction between suits brought by "Citizens" and suits brought by "States." It also would circumvent the abstention doctrine that prevents the Authority from bringing a collateral federal suit after initiating litigation in Maryland, and would subject ANS' Virginia members to a class representative adverse to their interests.

I. The Commonwealth's Legal Claims Are Not Ripe.

The Commonwealth is frustrated that the Authority's legal claims have not yet been resolved in the Maryland litigation and is seeking to litigate the Authority's claims collaterally before this Court. No case or controversy has arisen for Article III purposes, however, precisely because MDE has not decided whether to issue the permit. Importantly, no claim for a mid-river intake will be ripe until the Authority *also* obtains a permit from the Corps.

The Commonwealth also seeks to raise its legal claims by arguing that Virginia riparians are not obligated to seek Maryland's consent before increasing their appropriation of water from the Potomac. It would be frivolous for the Commonwealth to assert that this claims is ripe. The Commonwealth has failed to identify any Virginia riparian

landowner who is now seeking or who intends to seek additional water from the Potomac in the near future.

A. No Controversy Concerning the Authority's Proposed Intake Will Be Ripe Unless the Corps Issues Its Own Permit.

The Commonwealth apparently misunderstands the status of the Authority's dredge and fill permit before the Corps. *See* 33 U.S.C. § 1344 (requiring a Corps permit). The Commonwealth advised the Court that "[t]he United States Army Corps of Engineers gave its approval for the Authority's project more than three years ago, subject only to a successful resolution of the Maryland permit question." (Br. at 1.) In truth, the previously-issued permit was suspended by the Corps more than two years ago. (Letter from Reardon to Sultan of 1/28/98 (App. G) ("Based on this new information, I have no recourse other than to suspend your Department of the Army permit. . . .").) The Corps emphasized that "[f]ollowing this suspension, a decision will be made to either reinstate, modify, or revoke the subject permit." *Id.*

The Corps also has made it clear to ANS' counsel that the permit will not be reinstated as a matter of right if MDE ultimately issues a waterway construction permit. After ANS learned that the Corps had approved the initial permit without following applicable procedure, ANS' counsel wrote to the Corps requesting that the permit be revoked on numerous legal grounds. (Letter from Dubrowski to Zirschky of 12/22/97 (App. H).) The Corps responded by informing ANS' counsel that the issue had been mooted because the Corps already had suspended the permit. The Corps then advised ANS' counsel that "[i]f the county resolves the State's concerns and obtains required State permits, the District Engineer will fully consider the concerns expressed in your letter before making any decision to reinstate, modify,

or revoke the Department of the Army permit." (Letter from Zirschky to Dubrowski of 3/5/99 (App. I).) [4]

The fact that the Authority lacks the necessary authorization to construct the intake, regardless of any action taken or not taken by Maryland, demonstrates that this claim is not ripe. In *Anderson v. Green*, 513 U.S. 557 (1995), this Court dismissed a claim as not ripe under similar circumstances. In *Anderson*, this Court took jurisdiction to consider whether California's proposal to reduce Aid to Families with Dependent Children ("AFDC") payments to new residents violated the right to interstate travel. *Id.* at 559. For California to establish a payment differential for new residents receiving AFDC payments, Health and Human Services ("HHS") had to grant a waiver and such a waiver had been granted to California. *Id.* After the Court of Appeals had ruled in that case below, however, it vacated the HHS waiver in a separate proceeding. *Id.* Recognizing that no differential in payments would be made "[a]bsent favorable action by HHS on a renewed application for a waiver," this Court held that there is "no live dispute now, and whether one will arise in the future is conjectural." *Id.*; *see also Church of Scientology v. California*, 506 U.S. 9, 12 (1992) ("It has long been settled that a federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'") (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)).

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[4] In addition to the statutory obligation for the Corps to make a separate permitting decision now that the permit has been suspended, 33 C.F.R. § 325.7(c), the Corp's offer of a hearing to ANS would obligate the Corps to provide a fair hearing even if the offer was made only voluntarily. *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959); *Service v. Dulles*, 354 U.S. 363, 388 (1957).

Similarly, in *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998), this Court rejected a challenge to a Forest Service management plan as allowing excessive logging because it was unclear whether future permits that were required for the logging to take place ultimately would be issued. The general Forest Service management plan would have allowed the logging in question, but the plan did "not itself authorize the cutting of any trees." *Id.* at 729. Because logging would require compliance with the management plan and future site-specific permitting, this Court held that legal challenges would have to be made to the site-specific permits that would come later – "at a time when harm is more imminent and more certain." *Id.* at 734; *see also New Hanover Township v. United States Army Corps of Eng'rs*, 992 F.2d 470 (3d Cir. 1993) (rejecting a challenge to a federal permit because no permit was obtained from the state).

The same ripeness principle that animates *Anderson* and *Ohio Forestry* has been used to reject claims like the Commonwealth's in original actions as well. In *New York v. Illinois*, 274 U.S. 488 (1927), and *New Jersey v. New York*, 283 U.S. 336 (1931), the Supreme Court rejected the claims of plaintiff states that sued to protect their ability to begin waterway construction projects because those projects required the consent of third parties and that consent had not been obtained.

In *New York v. Illinois*, New York sought to enjoin Illinois from making allegedly excessive withdraws of water from Lake Michigan because New York claimed that it would need the water in the future to build dams to generate electricity on the Niagra and St. Lawrence rivers. In striking those claims from the bill of complaint as not ripe, the Court explained that New York

> does not show that there is any present use of the waters for such purposes which is being or will be disturbed, nor that there is any definite project for so using them

> which is being or will be affected. The waters are international and their use for developing power may require the assent of the Dominion of Canada and the United States. No consent of either is shown.

*New York v. Illinois*, 274 U.S. 488, 490 (1927).

Similarly, in *New Jersey v. New York*, New Jersey sought to prevent New York from diverting water from the Delaware River because it had future plans to construct dams to generate power. Relying upon findings by the Special Master, the Supreme Court determined that New Jersey's proposed construction "would need the consent of Congress and of the States of New York and Pennsylvania." *New Jersey v. New York*, 283 U.S. 336, 345 (1931). The Supreme Court determined that New Jersey's claim was not ripe because it had not received the consent of the necessary third parties.

The Commonwealth's claim against Maryland concerning the waterway construction permit is not ripe because future regulatory action is necessary for the project to take place. Until the Authority obtains the necessary permit to proceed with its project from the Corps, there is no ripe claim against Maryland.

### B. The Commonwealth's Request for an Advisory Opinion Concerning Water Appropriation Is Not Ripe.

The Commonwealth's Complaint also seeks a declaration that Virginia's riparians are exempted from having to seek Maryland's permission to withdraw water from the Potomac River. The Commonwealth offers no evidence that any sort of controversy exists between Virginians and Maryland concerning water apportionment. To the contrary, Virginia's Attorney General recently has denied any intention of seeking more water. Describing this litigation, Attorney General

Earley is reported as saying that "[o]ur case is very clear cut. We just want to improve our water quality. *We don't want to take one extra drop of water.*" *Early Expects Va. to Win Water-Intake Fight*, Fairfax J., Oct. 13, 2000, at A1 (App. J) (emphasis added).[5]

In its opening brief to the Supreme Court, the Commonwealth rightly concedes that "Maryland, to date, has not denied any Virginia user a permit to appropriate water from the Potomac River . . . ." (Br. at 29). Nevertheless, the Commonwealth complains that, if invoked, Maryland's permitting process for such appropriations could be burdensome and time-consuming. The Commonwealth has not identified any water appropriation permits that are pending and it is not clear that any will be sought in the near future. Consequently, no claim regarding regulatory approval for appropriation is ripe. *See e.g.*, *New York v. Illinois*, 274 U.S. 488, 490 (1927) (refusing to decide "abstract questions respecting the right of the plaintiff state and her citizens to use the waters" for possible future projects sometime "in the indefinite future"); *New Jersey v. Sargent*, 269 U.S. 328, 339 (1926) (rejecting New Jersey's challenge to the Federal Water Power Act premised upon its claimed intention to begin water power development because "the state is merely shown to be contemplating power development and water conservation in the future. There is no showing that it has determined on or is about to proceed with any definite project.")

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[5] Nor does the Commonwealth treat this as a serious issue. The *Fairfax Journal* reports that "[i]f Maryland agrees to issue the permit, Virginia will withdraw its case with alacrity, [Attorney General Earley] added." *Early Expects Va. to Win Water-Intake Fight*, Fairfax J., Oct. 13, 2000, at A1 (App. I) (emphasis added).

## II. The Commonwealth Lacks *Parens Patriae* Standing to Pursue The Authority's Claim for a Construction Permit.

The Commonwealth has no legally protected interest concerning the Authority's claim for a waterway construction permit, but is merely lending its name to the Authority in an effort to manipulate a forum before this Court where the Authority's claims can be heard. By its express terms, the Compact provision that the Commonwealth relies upon dealing with the "privilege" of making improvements in the river was given to the "*citizens* of each state . . . in the shores of the Patowmack river *adjoining their lands*." (Va. App. 3a) (emphasis added). Those riparian land owners are perfectly capable of enforcing their own rights. Indeed, the Authority has done so with the very counsel the Commonwealth now relies upon. The Authority requested the permit on its own behalf and, after the preliminary denial of the permit by MDE, it initiated litigation before a Maryland ALJ to obtain the permit. Plainly, it is the Authority and not the Commonwealth that is the real party in interest.

### A. Allowing the Commonwealth to Invoke Original Jurisdiction on Behalf of the Real Party in Interest Would Distort the Article III Jurisdiction of the Federal Courts.

In attempting to step into the shoes of the Authority, the Commonwealth seeks to invoke the jurisdiction of this Court by arguing that a state should be able to become the real party in interest whenever it chooses. For federal jurisdiction, the identity of a state as the real party in interest is of the utmost importance. Ordinary litigants typically acquire federal jurisdiction only when their suits involve a federal question, 28 U.S.C. § 1331, or are diversity actions where the matter in controversy exceeds $75,000, § 1332. Even then, jurisdiction is limited to the lower federal courts. By contrast, original jurisdiction exists in this Court "in all Cases . . . in which a

state shall be a party," U.S. Const., Art. III, § 2, cl. 2, regardless of whether a federal question is present or the monetary value at issue. Moreover, "the original jurisdiction of this court is exclusive over suits between states, though not exclusive over those between a state and citizens of another state." *Louisiana v. Texas*, 176 U.S. 1, 16 (1900); *compare* 28 U.S.C. § 1251(a) (exclusive original jurisdiction for disputes between states) *with* § 1251(b)(3) (original, but not exclusive, jurisdiction in disputes between a state and citizens of another state or aliens).

Because of the constitutional necessity of separating cases involving "States" from those involving private "Citizens," it has "become settled doctrine that a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens." *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976); *see Alfred L. Snapp & Sons, Inc. v. Puerto Rico*, 458 U.S. 592, 602 (1982); *Maryland v. Louisiana*, 451 U.S. 725, 737 (1981) ("A State is not permitted to enter a controversy as a nominal party in order to forward the claims of individual citizens."); *Hawaii v. Standard Oil*, 405 U.S. 251, 258 n. 12 (1972) ("[T]he State must bring an action on its own behalf and not on behalf of particular citizens."); *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 395 (1938); *Oklahoma v. Atchison, Topeka & Santa Fe Ry. Co.*, 220 U.S. 277, 286-89 (1911); *Louisiana*, 176 U.S. at 16. The Commonwealth cannot circumvent this requirement by supplementing the Authority's claims with "abstract questions of political power, of sovereignty, of government." *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923). This Court has concluded that

> if, by the simple expedient of bringing an action in the name of a State, this Court's original jurisdiction could be invoked to resolve what are, after all, suits to redress private grievances, our docket would be inundated.

> And, more importantly, the critical distinction, articulated in Article III, § 2, of the Constitution, between suits brought by 'Citizens' and those brought by 'States' would evaporate.

*Pennsylvania*, 426 U.S. at 665-66.

Having initiated litigation in Maryland, the Authority would be barred from raising these same issues in a collateral federal suit under numerous abstention doctrines, including *Texas R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, 500 (1941), *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), *Younger v. Harris*, 401 U.S. 37, 43 (1971), and their progeny. The principles of comity toward state tribunals that animate these doctrines would be circumvented if they could be avoided simply by having the Commonwealth reassert the Authority's arguments through a collateral proceeding in this Court.[6]

### B. The Commonwealth Is an Inappropriate *Parens Patriae* Class Representative.

The Commonwealth's assertion of *parens patriae* turns the doctrine on its head. Applying *parens patriae* here would not give the Commonwealth the ability to vindicate the interests of people who cannot defend themselves. As a practical matter, the Commonwealth's position would eliminate any viable forum for the Virginia riparians it seeks to help. If the Commonwealth were found to be the real party in interest, and not the riparian seeking a permit, 28 U.S.C. § 1251(a) would strip all courts but this one of jurisdiction to hear legal

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[6] This Court also repeatedly has expressed its concern that the Eleventh Amendment not be circumvented by allowing a state to sue another state on behalf of its citizens. *See e.g.*, *Maryland*, 451 U.S. at 745 n.21 (noting that the Eleventh Amendment is violated "if the plaintiff State is actually suing to recover for injuries to specific individuals"); *Standard Oil*, 405 U.S. at 259 n. 12; *Cook*, 304 U.S. at 392-93.

challenges to a permit denial by Maryland. This Court cannot hear all such claims, which would leave the majority of Virginia riparians without any judicial remedy. *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (recognizing that the Court may decline to hear cases within its exclusive jurisdiction).

The Commonwealth's position also is antagonistic to the interests of Virginia riparians because it is responsible for the nuisance that affects their property. Equity does not allow a wrong-doer to represent its injured in shifting the responsibility for the problem to a third party, particularly when the requested relief is incomplete. The Commonwealth should honor its legal obligations and control nonpoint sources.

Applying *parens patriae* standing also would bind an enormous class to a litigating position that is hostile to the interests of many of its class members,[7] including ANS' Virginia members who are customers of the Authority (App. C) and riparians on the Potomac. (App. D.) Allowing direct actions by individuals, like the one the Authority is pursuing, or class actions that provide class members with an adequate representative and an opportunity to opt out are clearly preferable. *Cf. California v. Frito-Lay, Inc.*, 474 F.2d 774, 776 n.9 (9th Cir. 1973).

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[7] *See, e.g., Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. 658, 692 n.32 (1979) ("[T]hese individuals and groups are citizens of the State of Washington, which was a party to the relevant proceedings, and 'they, in their common public rights as citizens of the State, were represented by the State in those proceedings, and, like it, were bound by the judgment.'") (quoting *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340-41 (1958)); *Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769, 773 (9th Cir. 1994); *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1470 (10th Cir. 1993).

### C. The Commonwealth Lacks A Quasi-Sovereign Interest That Would Support *Parens Patriae* Standing.

The Commonwealth does not claim standing on the basis of any direct injury to itself, and its claim of *parens patriae* standing on behalf of the people of Northern Virginia is not convincing. According to the Commonwealth, "[a]lthough it is the Authority that is seeking to construct the offshore intake, the Commonwealth of Virginia has a substantial interest in the outcome of this suit that entitles it to bring this original action." (Br. at 22 n.8.) The only support the Commonwealth offers to buttress this claim are citations to equitable apportionment cases and cases that involved a common injury to the people of the state that was caused by another state. *Id.*; (Reply Br. at 4 n.3.)

ANS does not question the Commonwealth's ability to assert *parens patriae* in a proper case for equitable apportionment or to protect its citizens from a common injury caused by another state, but this is not such a case. Equitable apportionment cases do nothing to advance the Commonwealth's claim of standing in this case as the Commonwealth has not sought equitable apportionment. In addition, this Court never has applied the equitable apportionment doctrine to a water body, like the Potomac, that is owned almost exclusively by one state. Moreover, the Commonwealth has assented to Maryland's jurisdiction to decide appropriation for more than 30 years, and this has become the settled course of conduct under the Compact. *See Nebraska v. Wyoming*, 507 U.S. 584, 595 (1993) (holding that acquiescence is binding); *Texas v. New Mexico*, 462 U.S. 554, 568 (1983) (compact displaces equitable apportionment).

There also are no allegations in this case that Virginians are being denied their fair share of waters from the Potomac. The Commonwealth cannot identify a single Virginia riparian who has a pending appropriation request from Maryland, and

the Commonwealth concedes that Maryland never has denied such a request. (Br. at 29.) In the Maryland litigation, the Authority itself explicitly declared that "[b]ecause the Authority does *not* seek an increase in its water appropriation authorization in this proceeding, the *quantity* of water to be taken from the Potomac in the future is irrelevant." (Pre-Hearing Brief of Fairfax County Water Authority at 5-6 (App. K).) The Authority's existing water appropriation permit allows it to make withdrawals from either the current shoreline intake or the proposed mid-river intake. *Id.* at 5. The Authority also claimed that the capacity of the treatment plant would prevent it from increasing its appropriation. *Id.* at 12. ("[T]he mixing chamber and conduit establish a 'bottleneck' and physically limit increases in the maximum intake capacity beyond that of the existing intake.").

In any event, assuming that the Commonwealth had standing to pursue equitable apportionment—something it has not requested here—it would need separate standing to bring the Authority's claim for a construction permit. *See Friends of the Earth v. Laidlaw Envtl. Serv., Inc.*, 120 S.Ct. 693, 706 (2000) ("[A] plaintiff must demonstrate standing separately for each form of relief sought.").

Finally, the Commonwealth cannot establish standing on the basis of some common threat to the people of Virginia from the State of Maryland.[8] The Supreme Court has emphasized that "a plaintiff state must first demonstrate that the injury for which it seeks redress was directly caused by actions of another State." *Pennsylvania v. New Jersey*, 426 U.S. 660, 663 (1976). In this case, however, the water quality impacts that the Commonwealth complains of are caused by

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[8] Even if the Commonwealth could establish standing to bring claims related to water quality, that would not establish its standing to challenge Maryland's requirement for approval before withdrawing a greater quantity of water.

Virginia itself through its failure to comply with the Clean Water Act in controlling pollution from Virginia's own shores.[9] Maryland's refusal to compromise its environment and the rights of its people by allowing the Authority's project does not make Maryland responsible for Virginia's failure to enforce the environmental laws applicable in Virginia.

Furthermore, there is no basis for the water quality threats that the Commonwealth alleges. The Commonwealth has suggested that the project is necessary to prevent outbreaks of disease associated with *Cryptosporidium* and *Giardia*, but, contrary to the Commonwealth's suggestion, there is no evidence that consumers of the Authority's water are threatened by either *Cryptosporidium* or *Giardia* and there is no evidence that moving the intake would reduce any risk that may exist. 1.2 million people consume the Authority's water every day and have done so for the four years since the construction permit was requested, yet the Commonwealth has not identified a single person to have been affected by *Cryptosporidium* or *Giardia* from drinking the Authority's water. This is not surprising.

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[9] The cases cited by the Commonwealth to justify its standing involve situations where the defendant state is alleged to have imposed a common hardship on the people of the plaintiff state through unfair taxation or by depriving the plaintiff state of its equitable allocation of water. (Reply Br. at 4 & n.3.) (citing *Colorado v. New Mexico*, 459 U.S. 176 (1982) (allocation of water); *Maryland v. Louisiana*, 451 U.S. 725 (1981) (taxation); *United States v. Nevada*, 412 U.S. 534 (1973) (allocation of water); *Kansas v. Colorado*, 206 U.S. 46 (1907) (allocation of water)). Strangely, the Commonwealth also relies upon *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976), a case where the Court rejected Pennsylvania's attempt to litigate *parens patriae* what were merely a collection of private claims. None of these cases suggest that a *parens patriae* suit can be maintained to force one state to come to another state's assistance.

The Authority operates a state-of-the-art facility that should eliminate virtually all *Cryptosporidium* and *Giardia* with a combination of filtration, chlorination and ozonation. Neither *Cryptosporidium* nor *Giardia* even have been detected in the water the Authority distributes to consumers, and the Commonwealth's brief is devoid of any evidence to the contrary. As the Commonwealth reminds us, "the Authority currently produces finished drinking water that complies with all federal and state water quality standards . . . ." (Br. at 11.) The Authority itself does not appear seriously concerned as it has not issued boil alerts or even targeted warnings to persons with compromised immune systems, which would be the appropriate response to a real threat.

Moreover, this case is unlike other *parens patriae* claims that have gone forward because there is no consensus among Virginians that the relief requested by the Commonwealth is appropriate.[10] To the extent that there is any real threat of pathogens in the Potomac, ANS' Virginia members believe that the proposed project would only magnify those risks. The water at the center of the river is more likely to contain *Cryptosporidium parvum*, the only species of *Cryptosporidum* known to harm humans, than waters along the shore. *C. parvum* is passed by mammalian waste, which is less likely to be in urban runoff from Sugarland and Broad Runs than waters from the middle of the river. More likely sources of *C. Parvum* do exist farther up the river, such as wastewater treatment discharge points and animal farms, and those waters are deflected from the shoreline intake by the waters from Sugarland and Broad Run. Consequently, by

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[10] The Commonwealth suggests that it has standing because the Authority's water is consumed in government buildings. (Reply Br. at 3). Of course, neither the Commonwealth nor any of the Authority's other customers have standing to sue Maryland to allow the Authority to modify the operation of its facility.

moving the intake to the center of the river, the Authority is more likely to withdraw water contaminated by *C. parvum*. The Commonwealth does not even suggest that there would be less *Giardia* at the center of the river.

If the Commonwealth continues to seek standing on the basis of a common threat to the people of Virginia from drinking the Authority's water, the Commonwealth would be required to seek an evidentiary hearing to demonstrate whether such a threat exists and, if so, whether it would be redressed by the proposed project. The Supreme Court has made it clear that it will "presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record," *Renne v. Geary*, 501 U.S. 312, 316 (1991) (internal citations omitted), and "'[i]t is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.'" *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 546 n.8 (1986) (quoting *Warth v. Seldin*, 422 U.S. 490, 517-18 (1975)). The Supreme Court also has emphasized that "[b]efore this Court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one state at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence."[11] Unlike the purported harm alleged by the Commonwealth, "[t]he injury or threat of injury must be both 'real and immediate,' not 'conjectural' or hypothetical,'" *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974), and "it must be

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[11] *New York v. New Jersey*, 256 U.S. 296, 309 (1921); *see Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 501 (1971) ("History reveals that the course of this Court's prior efforts to settle disputes regarding interstate air and water pollution has been anything but smooth . . . . The solution has been to saddle the party seeking relief with an unusually high standard of proof . . . .").

'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). On the current record, the purported threat from *Cryptosporidium* and *Giardia* does not come close to satisfying this standard.

## CONCLUSION

For the foregoing reasons, the Audubon Naturalist Society respectfully requests that the Special Master grant its motion to dismiss this case for a lack of subject matter jurisdiction.

Respectfully submitted,

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October 31, 2000

**APPENDIX B**

No. 129, Original

IN THE

SUPREME COURT OF THE UNITED STATES

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COMMONWEALTH OF VIRGINIA,
*Plaintiff,*

v.

STATE OF MARYLAND
*Defendant.*

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# SPECIAL MASTER'S MEMORANDUM OF DECISION NO. 1 (SUBJECT: *AMICUS CURIAE MOTIONS)*

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December 11, 2000

Loudoun County, Virginia ("Londoun County") and Loudoun County Sanitation Authority ("Authority") have moved to participate as *amici curiae* supporting the position of the Commonwealth of Virginia ("Virginia"). The Audubon Naturalist Society ("ANS") has moved to participate as an *amicus curiae* supporting the position of the State of Maryland ("Maryland"). Virginia and Maryland have consented to the Authority's motion, and there has been no objection made to Loudoun County's motion. Maryland has consented to the ANS motion; Virginia has not.

The ANS has also moved for leave to file a motion to dismiss for lack of subject matter jurisdiction.

## I. THE COMPLAINT

Virginia's complaint makes the contention that both its compacts wit. Maryland and an arbitration award grant it the complete and unconditional right to the full use of the Potomac River beyond the low water mark on the Virginia shore, provided that such use does not impair navigation, harm fisheries or otherwise interfere with Maryland's use. It is against the background of that contention and solely in the context of that complaint that these motions for *amicus* status must be evaluated.

Because the complaint raises legal issues that Virginia and Maryland, through competent counsel, can and undoubtedly will address adequately and completely and because both States are perfectly capable of evaluating and advancing any arguments suggested to them by the three *amicus* movants, we begin with a presumption that *amicus* motions should be granted only if the movants will provide some added value or net benefit to the resolution of this matter that the State parties would not provide.

## II. LEGAL STANDARD

Rule 37 of the Rules of the Supreme Court of the United States governs the filing of *amicus curiae* briefs in the Supreme Court. In proceedings before a Special Mater, however, the Federal Rules of Civil Procedures ("FRCP") are to be taken as guides. *See* Supreme Court Rule 17.2. This distinction is apparently made because proceedings before a Special Master are more akin to a trial in a federal district court than to any proceeding before the Supreme Court itself. The FRCP themselves do not contain any standard for granting or denying motions to participate as an *amicus curiae* during the trial of a case in federal court. However, by well established case law, federal trial courts have broad discretion on the question of whether to grant or deny *amicus curiae* status to a nonparty. *See Bryant v. Better Business Bureau*, 923 F. Supp. 720, 728 (D. Md. 1996); *Waste Management of Pennsylvania, Inc., v. City of York*, 162 F.R.D. 34, 36 (M.D. Pa. 1995); *Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp.*, 149 F.R.D. 65, 82 (D.N.J. 1993).

Interesting, no movant has addressed the standard that a Special Master should apply in ruling on motions for *amicus curiae* status. Instead, each has focused on its own "special interests" in supporting the position of the party with which it aligned. Although there is no rule that *amici* must be totally disinterested, case law is clear that *amicus* participation is disfavored where, as here, the motives of the applicants appear to be primarily partisan. *See Liberty Lincoln Mercury, supra*, at 82 (when party seeking to appear as *amicus curiae* is perceived to be an advocate of one of the parties, *amicus* status should be denied); *Concerned Area Residents for the Environment v. Southview Farm*, 384 F. Supp. 1410, 1413 (W.D.N.Y. 1993) (partiality of *amicus* is a factor to consider); *United States v. Gotti*, 755 F. Supp. 1157, 1159 (E.D.N.Y. 1991) (*amicus* applicant did the court a disservice by coming

only as an advocate for one side). An *amicus* should be a friend of the court, not a friend of a particular party.

By clear authority, a trial court may grant *amicus* status to those who, as traditional "friends of the court," can serve to provide helpful analysis of the law, protect their own special interests in the subject matter of the suit, contribute to the court's understanding, provide needed supplementary assistant to the parties' counsel, and insure a complete presentation of the issues. *See Bryand, supra,* at 728; *Liberty Lincoln, supra,* at 82; *Gotti, supra,* at 1158. In every instance, *amicus* participation will be permitted only if it will bring added value to the proceedings. Here, no movant has demonstrated that its participation as an *amicus* would provide a net benefit to these proceedings in serving any of those listed roles.

After careful consideration of the movants' full briefs, the motions of all three movants are DENIED, without prejudice, for the reasons more explicitly set forth below. Any movant may renew its motion if new, compelling reasons develop hereafter to support its participation as an *amicus curiae*.

## III. LOUDOUN COUNTY AND LOUDOUN COUNTY SANITATION AUTHORITY

Loundoun County and the Authority each make a credible assertion that they have substantial and unique interests in this litigation. However, both of them are political subdivisions of a party State, the Commonwealth of Virginia, and the Attorney General of Virginia represents their interests in this litigation. To the extent Loudoun County and the Authority have interests that diverge from those of any other subdivisions, departments, agencies, or constituencies that the Attorney General of Virginia represents, those interests involve conflicts internal to Virginia and are beyond the scope of this litigation and the reach of these proceedings. It is the Commonwealth of Virginia that is a party to these

proceedings and it and its political subdivisions must speak with one voice in this litigation.

Without doubt, Loudoun County and the Authority posses specialized information and insight that may be useful to the parties and the Special Master during the course of these proceedings. However, the best way for the movants to offer assistance is not through *amicus* participation, but through coordination and cooperation with existing counsel. Each movant-a political subdivision of Virginia-should work with the through the Attorney General of Virginia to ensure that Virginia's interest are properly and fully presented. It is Loudoun County's and the Authority's responsibility to keep the Attorney General of Virginia informed of how various aspects of this litigation may affect their interests and to assist the Attorney General in presenting those interests in those proceedings.

The Authority also suggests that, having obtained consent of the parties, it should be permitted to participate as a matter of course, citing Rule 37.3(a) of the Supreme Court Rules relating to the filing of briefs in cases before the Supreme Court for oral argument. As explained above, the short answer is that Rule 37 does not govern proceedings before the Special Master.

While participation by Loudoun County and the Authority in the limited way they have requested may not burden the process unduly, the Attorney General of Virginia represents their interests in these proceedings. Furthermore, their participation as *amici* is not necessary for their expertise and insight to benefit these proceedings. In sum, Loudoun County and the Authority have failed to demonstrate that their participation as *amici* is appropriate in the circumstances of this case, and their motions are DENIED, without prejudice.

## IV. AUDUBON NATURALIST SOCIETY

### A. Motion to Participate as an *Amicus Curiae*

Like the Authority, ANS argues that, based on Rule 37 of the Supreme Court Rules, the Supreme Court's grant of *amicus* status to ANS to file a brief opposing Virginia's motion for leave to file its complaint should accord it *amicus* status in the proceedings before the Special Master. A similar argument failed for the Authority and, for the same reason, it fails for ANS.

ANS further argues that, because it and its members use the portion of the river where Virginia proposes to build its intake pipe, because it and its members have significant rights in the Potomac River under the Public Trust Doctrine, and because it wants to file a motion to dismiss for lack of jurisdiction, it should be granted *amicus* status.

The first argument cuts too broad a swath. ANS and its members do not have an exclusive right to use the potentially affected portion of the river. The recreational and environmental interests of ANS members, including those who are Virginia riparian owners, are no different from the interests of many other members of the public. To grant ANS *amicus* status on that ground would open the floodgates to every other user, group of users, or riparian owner in that portion of the river.

ANS also suggests that "neither Maryland nor Virginia will have an interest in bringing to the Special Master's attention aspects of the Public Trust Doctrine and the police power that are relevant to a proper construction of the Compact." While ANS suggests that the Commonwealth may not adequately represent the interests of certain Virginia citizens who are members of the ANS, it offers no evidence that Maryland would not welcome advice and consultation from ANS or that Maryland's interests differ in any major respect from those of ANS and its members. Nothing has been advanced to suggest

that Maryland, as *parens patriae*, cannot adequately represent the interests of the ANS members who are Maryland residents and, concomitantly, the interests of those members of ANS who happen to be Virginia residents. Indeed, the substantive arguments set forth on pages 8-10 of the ANS brief can be made as easily by Maryland, if they are meritorious. There simply has been no showing that Maryland will not welcome any suggestions that ANS might make or that the interests of Maryland and ANS are divergent. ANS attempts to offer its views on the compact interpretation issues relevant to this case in its motion for *amicus* status, but it has not made any showing that counsel for the existing parties are incapable of fully and adequately presenting those arguments for consideration.

The Public Trust Doctrine argument is intriguing and very well set forth. But implicit in the assertion that members of the public may bring claims under the doctrine in their own right is the suggestion—without any evidence—that Maryland will not protect the values that ANS seeks to represent. And, again, ANS sweeps with too broad a brush by suggesting that "interested members of the public be allowed to vindicate their public trust rights independent of the states" and that "the people have standing to assert claims under the doctrine in their own right." If one organization is granted *amicus* status because of the Public Trust Doctrine, what logical basis would preclude other organizations seeking similar status?

ANS has failed to satisfy the criteria for a grant of *amicus* status and its motion is DENIED, without prejudice.

B. Motion to Dismiss for Lack of Subject Matter Jurisdiction

Finally, ANS has asked for leave to file a motion to dismiss for lack of subject matter jurisdiction. It is unclear whether ANS believes that, independent of *amicus* status, it somehow

has a right to file a motion to dismiss. So that there is no misunderstanding, it must be restated that ANS is neither a party nor an *amicus curiae* in this proceeding. It clearly, therefore, has no standing to seek leave to file any such motion.

For the sake of completeness, it should be noted that in its motion before the Supreme Court of the United States for leave to file an *amicus curiae* brief opposing Virginia's motion for leave to file a bill of complaint, ANS has already argued that Virginia's claim against Maryland is not ripe and that there is no evidence that a controversy exists between Virginia and Maryland. The Supreme Court implicitly rejected these arguments by granting the ANS motion to file its *amicus* brief and subsequently granting Virginia's motion for leave to file a complaint. There is no reason for me to consider them anew.

For the foregoing reasons, the ANS motion for leave to file a motion to dismiss for lack of subject matter jurisdiction is DENIED.

Dated: 12.11.00

/s/ Ralph I. Lancaster, Jr.
RALPH I. LANCASTER, JR.
Special Master

# UNITED STATES SUPREME COURT
# CERTIFICATE OF SERVICE

No. 129, Original

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COMMONWEALTH OF VIRGINIA
*Plaintiff,*

v.

STATE OF MARYLAND
*Defendant.*

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I, Steven J. Scott, Esq., Case Management Assistant and Law Clerk to Special Master Ralph I. Lancaster, Jr. in the above-captioned matter, hereby certify that I made service of Memorandum of Decision No. 1 by causing a copy of the same to be transmitted by facsimile and mailed by first class mail on December 11, 2000, addressed to counsel as follows:

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**APPENDIX C**

No. 129 Original

IN THE
SUPREME COURT OF THE UNITED STATES

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COMMONWEALTH OF VIRGINIA,
*Plaintiff,*

v.

STATE OF MARYLAND,
*Defendant.*

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Motion of the Audubon Naturalist Society for
Reconsideration of Dismissal
for Lack of Subject Matter Jurisdiction

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December 13, 2000

The Audubon Naturalist Society ("ANS") respectfully requests that the Special Master reconsider those portions of its December 11, 2000 Order ("Order") refusing to consider the subject matter jurisdiction of the Supreme Court to decide this case.[1] The Special Master's Order refusing to consider the Court's subject matter jurisdiction rested on two grounds: that ANS lacked "standing" to challenge the Court's jurisdiction and that the Supreme Court "implicitly rejected these arguments." Order at 7. ANS files this memorandum to bring to the attention of the Special Master arguments that warrant reconsideration of those parts of the Order.

## I. This Court Is Obligated To Consider Its Jurisdiction *Sua Sponte*.

As this Court is aware, subject matter jurisdiction is not something that must be raised by a litigant or by a person with "standing" in the case; indeed, the federal courts are obligated to address subject matter jurisdiction *sua sponte* even when all parties are willing to concede that jurisdiction exist. In *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990), for example, the Supreme Court dismissed a case for a lack of subject matter jurisdiction by explaining:

> Although neither side raises the [subject matter jurisdiction] issue here, we are required to address the issue even if the courts below have not passed on it, see *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969), and even if the parties fail to raise the issue before us. The

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[1] At this time, ANS is not seeking reconsideration of the Order's denial, without prejudice, of ANS' ability to participate as an *amicus curiae*. To assist ANS in monitoring this litigation to determine whether a change in circumstances would warrant renewing an application to participate as *amicus curiae*, however, ANS respectfully requests that the Special Master continue to require that ANS' counsel be served with all filings submitted by the parties.

> federal courts are under an independent obligation to examine their own jurisdiction . . . . '[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it. *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934). See *Juidice v. Vail*, 430 U.S. 327, 331-332 (1977) (standing).

*Id;* see *Steel Company v. Citizens For A Better Environment*, 523 U.S. 83, 94 (1998) ("'This [subject matter jurisdiction] question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.'" (quoting *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900))). Where questions to the Court's jurisdiction are raised by *amici*, the Supreme Court has addressed those issues by explaining that it "would be required, of course, to raise these matters on our own initiative." *ASARCO, Inc. v. Kadish*, 409 U.S. 605, 611 (1989).

In seeking leave to file a motion to dismiss for a lack of subject matter jurisdiction, ANS attached a copy of a motion to dismiss that demonstrates that the claims asserted by the Commonwealth are not ripe and that the Commonwealth lacks standing to assert them. Regardless of whether ANS is given any role in the briefing of such jurisdictional issues before the Court, the fact that the issues have come to the Court's attention requires that the Court consider those issues before addressing the merits of the case. *Steel Company*, 523 U.S. at 89-101 (holding that federal courts must address jurisdictional issues before addressing the merits).

## II. The Supreme Court Has Not "Implicitly Rejected" Challenges to Its Subject Matter Jurisdiction.

The Order attaches unwarranted significance to the fact that the Supreme Court allowed the Commonwealth to initiate this lawsuit by filing a Bill of Complaint after ANS had

alerted the Court to the fact that jurisdictional issues existed. By granting the Commonwealth leave to file the Bill of Complaint, however, ANS' jurisdictional arguments were not "implicitly rejected" by the Supreme Court as the Order suggests. Order at 7. Rather, the Supreme Court followed its usual course for interstate disputes by directing that all aspects of the case be addressed by a Special Master in the first instance.

As Justice Scalia has explained, in original actions the Court follows its "normal practice of permitting the suit to be filed and of referring all questions (including the standing question) to a special master . . . ." *Wyoming v. Oklahoma*, 502 U.S. 437, 462 (1992) (Scalia, J., dissenting). Consistent with this "normal practice," Special Masters have considered jurisdictional issues raised after leave to file a Bill of Complaint has been granted, *see e.g.*, Report of the Special Master at 10, *Wyoming v. Oklahoma*, No. 122 Orig. (filed Oct. 1, 1990), and the Supreme Court has followed the recommendations of Special Masters in rejecting jurisdiction over claims that it previously allowed to be filed. *See New Jersey v. New York*, 283 U.S. 336, 341 (1931) (relying upon Special Master's report in finding a claim not ripe). Although the Supreme Court could have addressed and explicitly decided the jurisdictional question before making any referral to the Special Master in this case, it did not do so here.

The mere grant of leave to file a Bill of Complaint is not a ruling that jurisdiction exists. As Justice Scalia explained in *Wyoming v. Oklahoma*:

> .To be sure, we might have given the standing question full-dress consideration to begin with, and, if we concluded in Oklahoma's favor, could have spared the parties lengthy proceedings before the Special Master. But the same could be said of the substantive issue . . . . Our choice not to proceed in that fashion was both in accord with ordinary practice and in my view sound. Almost all other litigants must go through at least two

> other courts before their case receives our attention. It has become our practice in original-jurisdiction cases to require preliminary proceedings before a special master, to evaluate the facts and sharpen the issues.

*Id.* at 463.

The Supreme Court's refusal to decide the question of jurisdiction before submitting the case to the Special Master reflects the limitations on the Court's institutional capabilities—not on the merits of the petitioner's claim to jurisdiction. As Justice Frankfurter has explained, "[t]he Court does not, indeed it cannot and should not try to, give to the initial question of granting or denying a petition the kind of attention that is demanded by a decision on the merits." *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 521, 527 (1957) (Frankfurter, J., dissenting). The Court is asked to hear far too many cases to give them a full briefing on jurisdictional grounds before allowing any particular case to be docketed.

The facts of this case demonstrate that the Court did not rule that jurisdiction exists. The Supreme Court has made it clear that it will "presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record," *Renne v. Geary*, 501 U.S. 312, 316 (1991) (internal citations omitted), and that "'[i]t is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.'" *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 546 n.8 (1986) (quoting *Warth v. Seldin*, 422 U.S. 490, 517-18 (1975)). The Commonwealth, however, has not alleged any set of facts that would overcome the presumption against the exercise of jurisdiction by this Court. The issues simply have not been fully briefed by the parties.

ANS' *amicus curiae* brief opposing leave to file the Bill of Complaint raised standing and ripeness issues that were not addressed by the Commonwealth in either its initial or its

reply brief. Even now, for example, the Commonwealth has failed to provide any explanation for how its claims relating to water appropriation could be ripe when no Virginian is making a request to increase its water appropriation. Similarly, the Commonwealth has not shown how its claims under the Compact for Virginians to initiate construction projects in the Potomac River are ripe when the only Virginian who has sought to begin such construction—the Fairfax County Water Authority—may never obtain regulatory approval for the project from the United States Army Corps of Engineers.

Given the fact that the issues of standing and ripeness were not fully briefed before the Supreme Court (and even now have not been fully briefed), it cannot fairly be concluded that those issues were implicitly decided by the Supreme Court. To the contrary, the Supreme Court appears to have done nothing more than follow its usual course of directing the entire case, including questions as to jurisdiction and the merits, to the Special Master in the first instance.

## CONCLUSION

For the foregoing reasons, ANS respectfully moves the Special Master to modify the Order to specify that the jurisdictional issues raised by ANS in its proposed motion to dismiss be briefed by the parties.

Respectfully submitted,

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# APPENDIX D

No. 129, Original

IN THE
SUPREME COURT OF THE UNITED STATES

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COMMONWEALTH OF VIRGINIA,
*Plaintiff,*

v.

STATE OF MARYLAND
*Defendant.*

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## SPECIAL MASTER'S MEMORANDUM OF DECISION NO. 2

(Subject: ANS Motion for Reconsideration of the Denial of Its Motion to Dismiss for Lack of Subject Matter Jurisdiction)

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December 28, 2000

The Audubon Naturalist Society ("ANS") has requested reconsideration of the portions of Memorandum of Decision No. 1 addressing the ANS attempt to have this matter dismissed for lack of subject matter jurisdiction. In support of its motion, ANS advances two points. First, it points out that the Special Master has an obligation to consider the jurisdiction question *sua sponte*. Second, ANS argues that the Supreme Court did not implicitly reject challenges to its subject matter jurisdiction by granting Virginia leave to file its Bill of Complaint.

I. The Merits of the Subject Matter Jurisdiction Question

Although ANS is correct in its assertion that any federal court has an obligation to address the absence of subject matter jurisdiction *sua sponte*, the essential flaw of the ANS motions for dismissal and reconsideration is that they focus only on portions of the pleadings while ignoring others. ANS must recognize that if *any* basis for subject matter jurisdiction appears from the pleadings, the Complaint will not be dismissed out of hand for lack of subject matter jurisdiction.

The Virginia Complaint is pled in the alternative. Among its allegations, and included in its prayer for relief, is the assertion that a proper interpretation of the Black-Jenkins Award of 1877, the Potomac River Compact of 1958 and Article VII of the Compact of 1785, grant Virginia the unfettered right to use the Potomac River and to construct improvements appurtenant to the Virginia shore upstream of the tidal reach of the Potomac, provided that such use does not impair navigation, harm fisheries or otherwise interfere with Maryland's use. For present purposes, it little matters that the Complaint contains alternative bases as a predicate for the relief sought.

Virginia has properly raised the legal question of whether Virginia has an absolute, congressionally-approved, contractual right to the use of the Potomac River for the

construction of improvements appurtenant to its shores upstream of the tidal reach without interference by Maryland. In its opposition to Virginia's motion for leave to file its complaint, Maryland flatly stated that the 1785 Compact was never meant to apply to the non-tidal stretches of the Potomac upstream of the District of Columbia. That issue is joined and, teed up by Virginia's motion for partial judgment, is being briefed.

In its April 21, 2000, opposition to the Virginia motion for leave to file its Complaint, ANS extensively addressed the ripeness of the dispute. With extensive citations of authority, ANS argued that Virginia's legal claims are not ripe and that it lacks standing. Both in the proposed motion to dismiss attached to the ANS motion for leave to participate as an *amicus* and in its present motion for reconsideration, ANS repeats those two claims and expands upon its argument that Virginia's "legal claims" are not ripe. First, those motions mistakenly focus upon the status of the permit dispute between Virginia and Maryland and the permit process with the federal government. (*See* ANS proposed Motion to Dismiss, pp. 1-10.) Second, ANS attempts to turn the dispute into a non-existent controversy over water appropriation.

Whatever the merits of the ANS ripeness arguments regarding permitting and water appropriation, ANS has overlooked the fact that Virginia seeks a declaratory judgment of its rights pursuant to the Compact and the Award—a purely legal question that, as the pleadings filed by both states show, presents an actual controversy between them. *See* 28 U.S.C. § 2201(a) (any court of the United States may grant a declaratory judgment in an actual controversy). Moreover, there is ample precedent that the Supreme Court of the United States has subject matter jurisdiction to resolve actual disputes between two sovereign states where the disagreement involves the interpretation or enforcement of solemn agreements between those states. *See*

*Kansas v. Nebraska and Colorado*, 120 S. Ct. 2764 (2000) (order denying Nebraska motion to dismiss regarding interpretation of Republican River Compact); *Kansas v. Colorado*, 514 U.S. 673 (1995) (decision on the merits in suit to enforce Arkansas River Compact); *Texas v. New Mexico*, 462 U.S. 554, 567-68 (1983) ("If there is a compact, it is a law of the Unite States, and our first and last order of business is interpreting the compact.") Indeed, the Supreme Court is the only court that can conclusively resolve issues of interpretation and enforcement of compacts between or among states. *See West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951) ("A State cannot be its own ultimate judge in a controversy with a sister State. To determine the nature and scope of obligations as between States, whether they arise through the legislative means of compact or the 'federal common law' governing interstate controversies is the function and duty of the Supreme Court of the Nation.").

Thus, whether Virginia's interpretation of its compact rights is right or wrong, the Supreme Court, and, by extension, the Special Master, both have jurisdiction to address the contract issues raised in the Virginia Complaint.

II. The Supreme Court's Implicit Rejection of ANS' Arguments

ANS is correct that referral of a matter to a special master by the Supreme Court does not, *ipso facto*, conclusively resolve the jurisdiction question. However, under the circumstances in this case, ANS understates the significance of that referral. In its proposed motion to dismiss filed with the Special Master, ANS makes arguments that are in most respects identical to the *amicus* brief it filed with the Court in opposition to Virginia's motion for leave. In addition, Maryland raised the same concerns in its opposition to the Virginia motion for leave, and Virginia responded to those concerns. After consideration of those briefs, the Supreme Court decided to grant the Virginia motion for leave to file a

complaint. This is a step that the Supreme Court takes not automatically or as a matter of course, but only when it finds that the matter meets the criteria the Court has established for the exercise of its original jurisdiction. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972) ("It has long been this Court's philosophy that 'our original jurisdiction should be invoked sparingly.' We construe 28 U.S.C. § 1251(a)(1), as we do Art. III, § 2, cl. 2, to honor our original jurisdiction but to make it obligatory only in appropriate cases." (Quoting *Utah v. United States*, 394 U.S. 89, 95 (1968)) (citation omitted)).

The only factual development since the Supreme Court's grant of the Virginia motion is the Maryland Administrative Law Judge's grant of a permit to Virginia. A letter to the Special Master dated November 8, 2000, from counsel of record for Maryland states that if Maryland decided that the decision ordering issuance of the permit affected the justiciable nature of this matter, Maryland would file a motion raising that issue by December 8, 2000. Maryland filed no such motion. Under these circumstances, there is no need to have the parties brief the subject matter jurisdiction issue as ANS has requested in its motion for reconsideration.

The motion of the Audubon Naturalist Society for reconsideration, along with its request that the Special Master order the parties to brief the subject matter jurisdiction issue, is denied, with prejudice.

/s/ Ralph I. Lancaster, Jr.
RALPH I. LANCASTER, JR.
Special Master

# UNITED STATES SUPREME COURT
# CERTIFICATE OF SERVICE

COMMONWEALTH OF VIRGINIA
*Plaintiff,*

v.

STATE OF MARYLAND
*Defendant.*

I, Steven J. Scott, Esq., Case Management Assistant and Law Clerk to Special Master Ralph I. Lancaster, Jr. in the above-captioned matter, hereby certify that I made service of Memorandum of Decision No. 2 by causing a copy of the same to be transmitted by facsimile and mailed by first class mail on December 28, 2000, addressed to Counsel as follows:

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